IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Charles E. Wells,
Appellant.

vs.

Patrick H. Bodkin and Arabella Bodkin,
Appellees.

BRIEF FOR APPELLANT.

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STATEMENT OF THE CASE.

Appellant brought this action in equity against the appellees, praying for a decree declaring that the defendants, appellees herein, hold the title to a certain quarter section of former public land in trust for this appellant and that the defendants be required to make a good and sufficient conveyance of said lands and the title thereof to the plaintiff and for the reasonable value of the use of said lands.

In his complaint appellant alleges in substance that he is and at all times mentioned herein, has been duly

qualified under the laws of the United States to make and perfect a homestead entry on public lands of the United States; that on May 18, 1903, the northwest quarter of section 11, township 7 south, range 22 east, S. B. M. situated in the county of Riverside, California, was open to entry under the land laws of the United States, and that on that date one Jacob H. Gieger duly made his homestead entry thereon; that on September 8, 1903, said lands together with others in the neighborhood thereof, were withdrawn by order of the land department under a first form withdrawal, from all forms of disposal under the provisions of the so-called Reclamation Act approved June 17, 1902; that while said lands were so withdrawn, one Florence V. Bodkin, an unmarried daughter of the appellees herein, filed a contest against the homestead entry of said Gieger, and thereafter on July 1st, 1908, upon the filing of a relinquishment of his entry by the said Geiger, the Commissioner of the General Land Office canceled the Geiger entry and at the same time notified Florence V. Bodkin that she had been awarded a preference right to enter such quarter section within thirty days after the same had been restored to public entry; that on January 10, 1910, the Secretary of the Interior duly made an order restoring such quarter section together with others in the neighborhood thereof to public settlement on April 18, 1910, and to public entry on May 18, 1910; that on April 18, 1910, appellant made actual settlement on the quarter section involved herein with the intention of making home-

stead application therefor and with his family resided on said quarter section until May 18, 1910, when he filed his homestead application as such settler for the land and paid the required fees, and thereafter continued to reside on the land and to improve the same, with his family, until dispossessed by appellees by a judgment of the Superior Court of the State of California in and for Riverside County, entered August 6, 1914; that on May 18, 1910, Florence V. Bodkin also filed her homestead application for the same land, claiming a preference right so to do under and by virtue of the alleged preference right awarded her by the land department upon the cancellation of the Geiger entry, following his relinquishment; that all such applications were suspended for reasons herein immaterial, until May 22, 1912, when said lands were again restored to public entry but subject to the entries already made thereon; that on March 25, 1912, said Florence V. Bodkin died leaving surviving as her heirs at law her father and mother, the appellees herein; that on June 3, 1912, the local land officers at Los Angeles, California, rejected the homestead application of appellant and notwithstanding the death of Florence V. Bodkin, allowed her homestead application on the ground that she had acquired a preference right under the laws of the United States by reason of the successful termination of her contest of the Geiger entry; that appellant appealed to the Commissioner of the General Land Office from such order of rejection and on November 15, 1922, Commissioner

affirmed the order of rejection; that appellant appealed to the Secretary of the Interior, who, on May 27, 1913, reversed the order of rejection and ordered the entry of Florence V. Bodkin canceled, and directed the allowance of appellant's entry for the reason that Florence V. Bodkin had died prior to the allowance of her entry, and that such application to enter did not descend to her heirs; that a rehearing of said matter was had by the Secretary and on August 29, 1913, the Secretary canceled the entry of Florence V. Bodkin and allowed that of appellant for the stated reason that Florence V. Bodkin had died prior to the allowance of her entry and that her heirs, appellees herein, having already used and exhausted their homestead rights, could not inherit the rights of said Florence V. Bodkin; that on September 18, 1913, the homestead application of Florence V. Bodkin was canceled and on October 14, 1913, the homestead application of appellant was duly allowed; that thereafter on the application of appellees herein as heirs of the said Florence V. Bodkin, deceased, the officers of the land department, without notice or hearing or evidence, and arbitrarily, on January 3, 1914, directed the local land officers to allow Patrick H. Bodkin, as father of said Florence V. Bodkin, thirty days to elect whether he would relinquish his then homestead entry upon other lands and make, with his wife Arabella Bodkin as co-heir, a homestead entry upon the lands herein involved, based on the application of Florence V. Bodkin, and that in the event of his so doing, the home-

stead entry of appellant on said lands should be canceled; that such notice was given and thereafter on March 6, 1914, said Patrick H. Bodkin filed his relinquishment in writing of a former homestead entry made by him on other lands, and thereupon, to-wit, on May 2, 1914, the officers of the land department canceled the homestead entry of appellant and allowed that of appellees as heirs at law of Florence V. Bodkin, deceased, upon the stated ground that said Florence V. Bodkin had acquired a preference right to enter said lands within thirty days after said lands had been restored to public entry by reason of her successful contest of the Geiger entry, and that said preference right descended to appellees as her heirs; that thereafter appellant adopted, used and exhausted all remedies provided by the laws of the United States and the rules and regulations of the land department concerning appeals and the exercise of supervisory authority, in order to secure his right as a settler and homestead entryman on said lands, but that the officers of the land department refused to allow him the right and allowed that of the appellees herein and thereafter caused patent to be issued to the said appellees as heirs at law of the said Florence V. Bodkin, which patent was issued October 23, 1919, and delivered Janaury 6, 1920.

In his complaint appellant further alleges that the officers of the land department committed mistakes of law in considering and acting upon the contest of Florence V. Bodkin against the Geiger entry and in

cancelling the homestead entry of appellant on May 2, 1914, after it had been duly allowed, and in deciding against appellant on his claim of right to make the homestead entry by virtue of his settlement on the land; and in denying appellant's right as a settler on the land to make such homestead entry, and in recognizing and deciding that Florence V. Bodkin had acquired a preference right to make homestead entry on the land by virtue of the successful termination of her contest of the Geiger entry, and that by reason of such mistakes of law, the appellant has been denied his rights to a patent for the land, and a patent therein has been issued to the appellees herein. Appellant further alleges that he had in fact complied with all the laws and requirements of the United States and all the rules and regulations of the land department relating to homesteads and to the residence thereon and cultivation and improvement thereof, with the exception only of the making and filing of final proof of completion and compliance, until he was ejected from the premises by judgment of the state court, as hereinbefore mentioned, in August, 1914.

In their answer the appellees admit all the averments of the complaint relating to the proceedings in the land department, but deny that the quarter section embraced by the Geiger entry was withdrawn under the first form withdrawal order, and on the contrary allege that such withdrawal order did not take effect on such land until the cancellation of the Geiger entry in the Bodkin contest; they deny that appellant

made actual settlement on the land in question on April 18, 1910, and allege on the contrary that appellant was a trespasser upon and unlawfully in possession of said tract of land for nearly two years prior to such date, and further allege that appellant was a "sooner" and trespasser in unlawful occupation of said land on April 18, 1910; appellees also deny that the application filed by said Florence V. Bodkin was an entry and deny that her application was subsequent to any entry of appellant; they deny that the order of January 3, 1914, wherein appellees were allowed thirty days to elect whether they would relinquish their then homestead and make application as heirs at law of Florence V. Bodkin to homestead the land in question, was made without notice or without hearing or evidence or arbitrarily; they deny that appellant used and exhausted all the remedies provided by law and the rules of the land department to secure his rights and to correct the mistakes claimed; they deny the allegations of the mistakes of law set forth in paragraphs 15 to 19 of the appellant's complaint; they deny that appellant has complied with the homestead law so as to entitle him to a patent.

Appellees make further and extensive answer, in which the same and other proceedings of the land department relating to this case are set forth, and also in their answer and more fully by the amendment to the answer, pleaded title by prescription and certain statutes of limitation of California.

Upon these pleadings the cause went to trial in the District Court and all of the allegations of the complaint setting forth the departmental history and records of the conflicting applications, were fully sustained by the evidence, and certain oral testimony was given on the question of settlement by appellant on the land in question and on the subject of compliance with the homestead laws, and as to the value of the use and occupation thereof from the date of issuance of the patent to appellees.

The Evidence and Proofs in the Record.

The evidence introduced shows that on July 17, 1902, a second form withdrawal of the land in question was made by the Secretary of the Interior [record p. 39]; that on May 18, 1903, Geiger filed his homestead application for the land in question subject to a second form withdrawal; that on September 12, 1903, the Secretary of the Interior withdrew the land in question from all forms of disposal whatever under the first form of withdrawal under the Reclamation Act [record p. 40]; that on January 30, 1908, Florence V. Bodkin filed a contest affidavit against the Geiger entry and that on March 13, 1908, such contest was withdrawn by the contestant and on the same day Geiger's relinquishment of the entry was filed and that the contestant paid the $1.00 cancellation fee and was notified that she was given a preference right of entry to be exercised within thirty days after the land was open for entry [record pp. 41-43]; that the

lands were thereafter duly opened to settlement on April 18, 1910, and to entry on May 18, 1910.

That on April 18, 1910, appellant made actual settlement on the land in question and established his residence thereon with his family on that date, and thereafter resided thereon and cleared some seventy or eighty acres, and cultivated sixty acres, purchased sixty shares of water stock for the same and raised crops of grain and cotton thereon, and remained in actual residence thereon until September 15, 1914, when he was forced off the land by appellees [record pp. 77-89].

That on May 18, 1910, appellant filed his homestead application to enter the land in question, alleging therein that he had made actual residence on said land and was an actual settler thereon [record pp. 43-44]; that on May 18, 1910, Florence V. Bodkin also filed her homestead application and paid the fees therefor under her claim of preference right; that both such applications were suspended on May 18, 1910, pending a hearing as to the character of the land, and that thereafter on May 24, 1912, the application of appellant was rejected because of the homestead application of Florence V. Bodkin for the same lands filed May 18, 1910, under the preference right in the case of Bodkin v. Geiger [record p. 45]; that on June 3, 1912, notice of such rejection was given to appellant in writing [record p. 48]; that appellant duly appealed to the Commissioner of the General Land Office from such rejection and on November 15,

1912, the Commissioner affirmed the rejection, holding that Florence V. Bodkin had acquired a preference right to enter such lands by virtue of the successful termination of her contest of the Geiger entry, and that her application was in all respects regular and in the exercise of such preference right [record pp. 49-52].

That appellant appealed to the Secretary of the Interior where it became known to the department that Florence V. Bodkin had died on March 25, 1912, prior to the allowance of her entry which was made on June 1, 1912, and on such appeal the Secretary canceled the Bodkin entry and ordered the allowance of the Wells application in the event that he make proper showing of present qualifications to make homestead entry for the tract, basing such decision on the proposition that the application of Florence V. Bodkin to make homestead entry did not descend to her heirs, and that there was no authority of law for the allowance of entry in such case in the name of a deceased applicant [record pp. 52-53]. Thereafter appellees, as heirs of Florence V. Bodkin, made a motion for rehearing of the last mentioned decision and on August 29, 1913, the Secretary denied such motion for the reason that it was made to appear that Bodkin, appellee, one of the heirs of the deceased applicant, had made other homestead entry in his own right, which precluded him and his wife as heirs of this daughter from perfecting the application filed by her; and in such decision directed that the entry of Florence V.

Bodkin be canceled and that the application of Wells should be allowed [record pp. 54-60].

That appellees thereafter petitioned the Secretary of the Interior for the exercise of his supervisory authority, and on January 3, 1914, the Secretary decided that the filing of the application of Florence V. Bodkin under her preference right determined her heirs' rights in the premises so far as the form of entry under such preference right is concerned, and that no substitution for her homestead application of some other form of entry or purchase after the thirty days' period could have been made by her or by her heirs so as to preserve such preference right to extend the same beyond thirty days; but the appellees as heirs at law were held to have the technical right to perfect the deceased daughter's application by making entry on the land, notwithstanding the homestead entry made by her father one of said heirs; that the fact of the father having made such homestead entry in his own right does not preclude his election to make and perfect homestead entry as co-heir with his wife based upon the application of his daughter, notwithstanding his present entry or Wells' appearance in the case. In such decision the appellee Bodkin was allowed thirty days to elect whether he would relinquish his present homestead entry and make, with his wife as co-heir, homestead entry based on his daughter's application [record pp. 60-63].

That on January 26, 1914, the appellee Bodkin was given notice in writing of such decision [record pp.

64-65] and he thereafter, on March 6, 1914, relinquished his homestead entry on other lands and as one of the heirs and for the heirs of Florence V. Bodkin, deceased, filed his application for homestead entry on the land in question on March 6, 1914, and attached thereto his affidavit stating that he made such application pursuant to the decision of the land department and as heir of said Florence V. Bodkin and based on her application filed May 18, 1910. [Record pp. 67-70.]

That thereafter on May 2, 1914, the Commissioner of the land office canceled the former homestead entry of Bodkin, appellee, on his relinquishment of March 6, 1914, and also canceled the entry of appellant [record pp. 70-71]. Thereafter on September 22, 1914, appellant filed his application to contest the homestead entry of appellee Bodkin, charging fraud and perjury [record pp. 72-74]. That on the same day the local land officers rejected such application to contest on the ground that the allegations of contest did not state facts sufficient to constitute a cause of action, and gave notice of such rejection to appellant who, on October 28, 1914, filed in the local land office his notice of appeal therefrom to the Commissioner [record pp. 75-76]; that on November 1, 1914, the local land officers transmitted to the Commissioner such application to contest and notice of appeal [record pp. 76-77]; that no hearing or decision of said appeal has ever been had. [Record p. 97.]

Upon such record evidence and the testimony of the witnesses given at the trial, the cause was submitted and thereafter on May 5, 1922, the court entered its decree dismissing the cause, at the same time filing a memorandum opinion, wherein the Honorable District Judge in substance, held that the officers of the department ruled correctly with respect to the Bodkin contest of the Geiger entry, that the patent relied upon was granted solely through the use of the preference right accorded to Florence V. Bodkin in virtue of her successful contest, and therefore this case is ruled in all its substantial aspects by the decision of the Supreme Court of California in McLaren v. Fleisher (181 Cal. 607), affirmed on appeal by the Supreme Court of the United States; and that the ruling of the department to the effect that the preference right awarded to Florence V. Bodkin in her contest was inheritable by the heirs of the entryman, pursuant to the terms of the Act of July 26, 1892, and was a reasonable construction of that Act, and that the appellees herein had rightfully inherited the right to consummate the entry of their deceased daughter, and that to allow such entry to proceed to patent was but the lawful recognition of a valid right inuring to the heirs, and for these reasons the usual form of decree of dismissal of the complaint was ordered entered. [Record pp. 109-111.]

From such decree Wells has appealed and filed his assignment of errors [record pp. 103-116], and on the record filed herein prays for a reversal of the decree dismissing his cause.

Specifications of Error.

While appellant relies upon each and every of his specifications of error as made and filed with his petition for appeal, the same naturally arrange themselves and fall into general groups embracing a single subject, and may be restated for the purpose of this brief as follows:

1. The decree is erroneous in that it decides that the officers of the land department did not make a mistake of law in holding that a preference right of entry became vested in Florence V. Bodkin as a result of the successful termination of her contest of the Geiger entry, following his relinquishment, while the land embraced in his entry was withdrawn from all forms of disposal under the Reclamation Act; and in holding that a preference right could be so lawfully acquired as a result of a successful contest of an entry on lands so withdrawn.

2. That the decree is erroneous in that it decides that the officers of the land department did not make a mistake of law in holding that the appellees herein, as heirs at law of Florence V. Bodkin, succeeded to and inherited the right of their deceased daughter to consummate her entry as evidenced and determined by her application of May 18, 1910, and in holding that such preference right was not terminated or exhausted by her application, but survived and descended to her heirs.

3. That the decree is erroneous in that it decides that the officers of the land department did not make a mistake of law in holding that the appellees, as heirs at law of Florence V. Bodkin, were competent to inherit her preference right of entry even after she had exercised such right by filing her application based thereon, notwithstanding at the time of her death and during all this conflict, the appellee Bodkin was holding a homestead in his own right.

4. That the decree is erroneous in that it decides that the officers of the land department did not make a mistake of law in canceling appellant's entry, which had been allowed on October 14, 1913, and allowing that of appellees made on March 6, 1914, as heirs of Florence V. Bodkin, without notice, hearing or evidence.

5. That the decree is erroneous in that it decides that the officers of the land department did not make a mistake of law in holding that the regulations of January 19, 1909, did not terminate any right that may theretofore have come to Florence V. Bodkin by reason of her contest of the Geiger entry and its relinquishment and cancellation.

POINTS STATED.

First Point: Appellant claims that upon the withdrawal of lands from all forms of disposal under a first form withdrawal under the Reclamation Act, all the land laws, other than the Reclamation Act,

are suspended, and in effect repealed, insofar as such withdrawn land is concerned, and that no right in, or claim to such land may be initiated during such withdrawal; that the law authorizing a contest of public land entries along with the law providing for a preference right flowing to the successful contestant in such a contest, are among the land laws so suspended, and therefore no contest of an entry embraced in a first form withdrawal under the Reclamation Act, can lawfully be maintained so as to initiate the preference right created by the Act of May 14, 1880. In short, that such a contest, being in its very nature the initiation of a claim to the land, is without authority of law, and therefore no preference right as defined by the Act of May 14, 1880, can lawfully flow therefrom.

Second Point: On the assumption that a preference right became vested in Florence V. Bodkin upon the termination of her contest of the Geiger entry by securing his relinquishment, appellant claims that such preference right was exhausted—used up and became *functus officio*—by the filing of her homestead application, based on such preference right, within the thirty days after the land in question was restored to entry. That such preference right was extinguished by such homestead entry just as certainly as it would have been extinguished if she had not exercised the same within the thirty day period of limitation. That being so extinguished and merged in the homestead application, and the applicant having died before allow-

ance of her entry, all rights thereunder died with her, it being conceded that an application to enter does not descend to heirs of the applicant. That a used preference right is not inheritable.

Third Point: That whatever right may have accrued to Florence V. Bodkin from the cancellation of the Geiger entry under her contest on July 1, 1908, was terminated by the regulations of January 19, 1909, promulgated long before her application to enter thereunder was filed.

Fourth Point: That the officers of the land department erred in matter of law in canceling appellant's homestead entry after it had been allowed, without a hearing or trial, and solely upon the petition of appellees alleging that their daughter had been prevented from settling upon the land embraced in her homestead application by threats and intimidation of appellant, and in arbitrarily deciding that appellant should not be allowed to profit by his wrong in so preventing settlement, and in arbitrarily granting to appellee, Bodkin, the right to elect whether he would relinquish his present homestead entry and make with his wife as co-heir, homestead entry on the appellant's land, based on the deceased daughter's application; and in canceling appellant's entry upon the filing of such relinquishment and a new homestead application by appellees, as heirs of the deceased applicant.

ARGUMENT.

First Point.

In support of appellant's claims asserted under the first point, we call the court's attention to the laws and land regulations relating to contests and to departmental and judicial construction of the effect of a Reclamation Act first form withdrawal thereon.

Section 2297 of the Revised Statutes is the sole source of legal authority for contesting a public land entry. It is as follows:

> "If at any time after the filing of an affidavit as required by section 2290, and before the expiration of the five years mentioned in section 2291, it is proved, after due notice to the settler to the satisfaction of the register of the land office, that the person having filed such affidavit, has actually changed his residence or abandoned the land for more than six months at any time, then and in that event, the land so entered shall revert to the government, etc."

By section 2 of the Act of May 14, 1880 (21 Stat. 140), Congress created a preference right to flow from such a contest as follows:

> "In all cases wherein a person has contested, paid the land office fees and procured the cancellation of any preemption, homestead or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter such lands."

Section 3 of the Reclamation Act (32 Stat. 388), provides as follows:

> "That the Secretary of the Interior shall, before giving the public notice provided for in section 4 of this act, withdraw from public entry lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purpose of the act: the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works, etc."

By common acceptance and usage the withdrawal from public entry for *irrigation works* is called a withdrawal of the first form, and that of lands believed to be *susceptible of irrigation from said works* is a withdrawal of the second form.

That a withdrawal of lands under the first form is legislative in its nature and effect was held by the secretary in the case of John J. Manny (35 L. D. 250) wherein he stated:

> "Such withdrawals (for irrigation works under the reclamation act) have the force of legislative withdrawals, and are therefore effective to withdraw all lands within the designated limits to which right has not vested."

He had previously made the same declaration in his instructions of January 13, 1904 (32 L. D. 387).

The order withdrawing the lands in question herein provides for the withdrawal "from all forms of disposal whatever under the first form of withdrawal authorized by section 3 of the Act of June 17, 1902, 32 Stat. 386" (Record p. 40).

As to the effect of such withdrawal the Supreme Court of the United States, in the case of McLaren v. Fleischer (253 U. S. 479), (hereinafter more fully reviewed) said:

> "The withdrawal did not extinguish Rider's entry, but while in force, prevented the initiation of other claims."

From the foregoing authorities to the effect that a first form withdrawal under the reclamation act is legislative, and that no other claim to the land may be initiated during such withdrawal, we claim we are entirely justified and correct in asserting that the law allowing contests of public land entries together with its companion—the preference right law of 1880—is suspended during such withdrawal, and that therefore no valid or lawful contest of entries on such withdrawn lands may be had, and that no preference right as provided by the Act of 1880 may flow therefrom. It therfore follows that even if such a contest is entertained by the land department and the entry canceled, no legal right flows therefrom to the contestant.

In the case at bar the contestee,—the former entryman—filed his relinquishment of his entry and on such filing, the contest was withdrawn and the old entry canceled. [Record p. 41.] It thus is made to appear that regardless of the validity of the contest against his entry, he relinquished, and the land embraced in his entry reverted to the government and was, on April 18, 1910, open to public settlement.

Apparently in recognition of the legislative suspension of the contest law as affecting lands under a first form withdrawal, the land department sought to create by regulation a new right of contest by promulgating the regulations of June 6, 1905, section 6 of which provided:

> "Any entry embracing lands included within any withdrawal made under either of the forms mentioned, whether such entry was made before or after the date of such withdrawal, may be contested and canceled because of entryman's failure to comply with the law or for any other sufficient reason, and any contestant who secures the cancellation of such entry and pays the land office fees occasioned by the contest, will be awarded a preferred right of making entry under the Reclamation Act, provided the lands involved are not embraced within a withdrawal of the first form." (33 L. D. 607.)

Here is apparent a direct attempt on the part of departmental officers to reenact the contest law as embodied in section 2297 of the Revised Statutes and

in section 2 of the Act of May 14, 1880, and which laws we claim were suspended by the first form withdrawal as to all lands embraced within such withdrawal.

By section 7 of the same regulations, the land department provided that "any contestant who gains a preference right to enter any such lands may exercise that right within thirty days from notice that the lands involved had been released from such withdrawal and made subject to entry." (33 L. D. 607.)

It was under the authority of these regulations that the contest of Florence V. Bodkin against the Geiger entry was entertained and the preference right awarded. Clearly the land department had no authority to legislate such a right, and therefore no preference right accrued to the contestant upon the relinquishment of the entry by Geiger and its cancellation by the commissioner.

On this point, this court has heretofore expressed itself in the case of Edwards v. Bodkin (249 Fed. 562), wherein these same regulations were before the court for consideration. It was therein said:

> "If it should be conceded that defendant did obtain a preferential right to enter the land while the land was completely withdrawn from entry under the first form, it was a right which, based upon a regulation, might be terminated by the Secretary of the Interior before entry, and in our opinion was so terminated by the regulations of January 19, 1909."

The foregoing is in exact consonance with our claim that the Bodkin contest was not filed pursuant to statutory law, but pursuant to and under the authority of the regulations of 1905, and the statement of the court strongly tends to a declaration that no statutory preference right could be gained thereby.

On a second appeal taken in the same case and reported in 265 Fed. 621, this court said with reference to what it had decided on the first appeal, that it had decided, among other points:

> "That the defendant acquired no preferential right by the proceedings had by reason of the lack of authority in the commissioner of the General Land Office to promulgate the rule under which the right is claimed."

The rule referred to was section 6 of the regulations of June 6, 1905.

On appeal to the Supreme Court of the United States, taken by Bodkin in that case, the judgment of this Honorable Court was affirmed on motion and under a rule of that court, so that no decision on the law questions involved was made.

In another case, however,—McLaren v. Fleischer,—going from the Supreme Court of the state (181 Cal. 607), to the Supreme Court of the United States (253 U. S. 479) on certiorari, the latter court, in reviewing this court's decision in the Edwards case, held that

> "the observations of the Circuit Court of Appeals respecting preferred rights were *obiter dicta,* and

> as the decree of affirmance in this court was put on other grounds, those observations are neither authoritative nor pursuasive."

This statement however appears to be limited to that part of this court's decision touching the right of the land officers to extend the period of a preference right, where the land contested is under a withdrawal. No question of the legality of the contest itself was raised or decided in the McLaren case, either in the state court or the United States Supreme Court, the sole question for decision therein being declared by the Supreme Court to be "whether the officers of the land department erred in matter of law in holding that under the Act of May 14, 1880, Fleischer was entitled to thirtv days after the land was restored to entry within which to exercise his preferred right of entry."

In that case the whole discussion was based on the assumption that the contest was a lawful contest, and that a preference right had accrued, and the decision therein to the effect that the rule embraced in section 7 of the regulations of June 6, 1905, was a reasonable construction of the Act of May 14, 1880, in connection with the Reclamation Act, was predicated upon the assumption of a legal contest, resulting in a legal preference right, the sole question therein being limited to the department's right to extend the life of such right.

It will thus appear that the question raised in our first point has not been passed upon by a higher court,

and that the decision and observations of this court relating thereto in the Edwards case, may well be herein repeated and declared to be the law. And we have the authority of the highest court as expressed in the same McLaren case for our assertion that during a first form withdrawal, no claim may be initiated to the land. The institution of a statutory contest is just as much the initiation of a claim to the land contested through the operation of the Act of May 14, 1880, as is the filing of an application to enter. If the contest is legal, and is successful, a preference right of entry follows, and under departmental construction since the beginning of such contests, such preferential right relates back to and takes effect as of the date of filing of the contest. It logically follows that by a contest one initiates a claim to the land contested. This, the highest court has said cannot be done. We respectfully submit that the Bodkin contest was not lawful, that no right flowed therefrom, that Geiger's relinquishment freed the land from other private claims, and that on the restoration under the order of January 10, 1910, the land in question was unoccupied public land of the United States and open to settlement. That by his actual settlement thereon on April 18, 1910, appellant gained the settler's preference right secured to him by section 3 of the Act of May 14, 1880, and that he exercised that right in a timely manner when he filed his homestead application on May 18, 1910, thus securing to himself the right to perfect his homestead entry by residence, improve-

ment and cultivation over a period of three years, thus earning the equitable title to the land and entitling him to a patent therefor. (Section 2291 Rev. Stat. as amended June 6, 1912.)

Second Point.

Granting for the sake of argument that appellees' deceased daughter gained a preference right to enter the land in question by virtue of her contest, and that she exercised it within the period allowed to her under the regulation of 1905, appellant claims that such application had the effect of exhausting whatever preference right she had had, and she thereupon became an applicant in the same standing as any other qualified homestead applicant. That having used her preference right in her homestead application, it was gone, and having died before such application had been allowed, her rights were terminated, in so far as her heirs are concerned, just the same as those of any other applicant would have terminated on death after application and before allowance. It has always been held by the land department that "no right is acquired by mere application to make homestead entry as will, in the event of the death of the applicant, descend to his widow or heirs or that can be disposed of by will; nor is there any authority of law for the allowance of entry, in such case, in the name of a deceased applicant." (Garvey v. Tuiska, 41 L. D. 510.) It was therefore held in this case by the land department that the allowance of the Florence V.

Bodkin entry after her death was erroneous, and it was ordered canceled. (Record p. 53.)

However, thereafter appellees claimed that the daughter's application was not a "mere application to enter" but by reason of having been filed by her under her preference right as successful contestant against Geiger's entry, is based on a statutory right of entry given by the Act of May 14, 1880, and preserved to her heirs by the Act of July 26, 1892 (27 Stat. 270).

This later act consists of an amendment of section 2 of the Act of May 14, 1880, by adding the following:

> "Provided further, That should any such person who has initiated a contest die before the *final termination of the same,* said contest shall not abate by reason thereof, but his heirs who are citizens of the United States, may continue the prosecution under such rules and regulations as the Secretary of the Interior may prescribe, and said heirs shall be entitled to the same rights under this act that contestant would have been if his death had not occurred." (Italics ours.)

In the proceedings herein before the department and on motion for rehearing, the secretary, having decided that an application to enter was not inheritable, held that, notwithstanding the preference right had been used in the making of such application, it still existed for the purpose of descending to heirs, and decided that in the case at bar the heirs of Florence V. Bodkin inherited the right to consummate her

application, but being ineligible to perform the homestead requirements of residence and improvement because of the father holding another homestead in his own right, could not take the same, and ordered the cancellation of the daughter's entry. (Record pp. 54-60.)

Thereafter, on petition of appellees for the exercise of supervisory authority, in which for the first time, appellees claimed that appellant prevented settlement by their daughter on the land by threats and intimidation (although during all such time residence was not required, the entry being suspended pending a hearing as to the character of the land), the secretary, as we say, arbitrarily and without hearing or trial, other than by affidavit, decided to permit Bodkin to elect between the two homesteads,—his own and his daughter's,—and ordered that in the event that Bodkin should relinquish his own homestead, he, with his wife as co-heirs, should be allowed to file a new application for the land in question, in which event, appellant's entry should be canceled. (Record pp. 60-63.) Bodkin elected to relinquish and thereupon he and his wife filed the application to homestead herein upon which patent herein was subsequently granted; and thereupon the homestead entry of appellant was canceled. (Record p. 71.)

This was all done on the theory that appellant had no rights at all, except as the department had temporarily granted him, and that the preference right of the deceased daughter had survived its use in filing her

homestead, and had descended to her heirs so that they might exercise it long after it had already been once used, and years after the thirty day period after restoration had expired. And this in the face of the departmental decision of November 15, 1912, wherein it was held that "Miss Bodkin's application, in all respects regular, filed as aforesaid, in the exercise of her right as a successful contestant, was, in the circumstances stated, the equivalent of an actual entry." (Record pp. 50-52.) And in the face of the secretary's decision of August 29, 1913, wherein he held that "where contestant's death intervenes before the right of entry given him inchoately with his privilege of contest is merged into actual entry or otherwise extinguished in some of the ways indicated."

It must be quite patent that the accusation of intimidation and threats on the part of the appellant, made by appellees, so prejudiced the officers of the land department, that they were led into the mistake herein complained of, in their natural desire to punish a wrongdoer, and this without a trial or hearing of evidence. This attitude is further illustrated by the refusal of the department to hear or entertain an appeal of appellant duly taken from the order rejecting his application to contest the last Bodkin entry on the ground that he procured such entry and its allowance by fraud and perjury. (Record pp. 72-74-76-77 and 97.)

It will be observed that the Act of July 26, 1892, limits the application thereof to a contestant who dies

"before the final termination of the same." We contend that final termination of a contest can be placed no later than the date of exercise of the preferred right, or the expiration of the thirty day period. The statute uses the expressions, "said contest shall not abate," and that his heirs "may continue the prosecution thereof," and "said heirs shall be entitled to the same rights under this act that contestant would have been if his death had not occurred," all of which support the views expressed by us. The last act under a contest which may be permitted to a successful contestant is to exercise such right by filing an application. Thereafter, all virtues or special qualifications drop from the contestant, as a contestant, and he becomes an applicant, co-equal in rights and liabilities with all other applicants. The unallowed application of any other applicant to enter becomes defunct upon the death of the applicant. It is a fearful straining of terms and logic to argue that an applicant under a preference right secured by contest possesses power of casting the used up preference right by descent to his heirs. If such be true, then any settler who has settled on public land, and thereby gained the preferred right of entry under section 3 of the same Act of May 14, 1880, and who has duly filed his application to enter, pursuant to such preference right, but who dies before the application is allowed, could pass his preference right on to his heirs. Such is not the law, and in this respect a mistake of law was made by the land officials, and the decree herein is

erroneous in that it decides that such action of the land officials was correct and that in the circumstances the preference right of the deceased daughter descended to her heirs by virtue of the provisions of the Act of July 26, 1892.

Third Point.

We claim that whatever preference right was gained by Florence V. Bodkin through her contest of the Geiger entry, was gained by virtue of the regulations of June 6, 1905, and such right not having been exercised prior to the regulation of January 19, 1909, it was terminated by such latter regulations.

In the case of Edwards v. Bodkin (249 Fed. 562), this court so decided, and we feel that nothing in the McLaren decision is to the contrary.

Fourth Point.

The fourth point has been covered so completely in the discussion of the foregoing points, that no special argument appears necessary in its support, except to say that it appears from the evidence that for over two years the appellees elected to claim other land as a homestead, their claim to the land here in question during that time being, solely, that they had inherited the right to claim it *in addition* to such other homestead; that failing to secure an allowance of such claim, in order to establish a sort of settlement on the part of the daughter, they alleged that the daughter, during her lifetime, was prevented from settling

on the land applied for through fear of the appellant. No specific reason for such fear was stated, no intimidating act of appellant was set forth, no hearing was had on such charge, nor was any finding of intimidation ever made bv the department, but instead, the department permitted the appellees to decide the matter for themselves by stating that if appellant had intimidated the deceased, he should not be permitted to profit by his wrong, if the heirs of deceased now desire to perfect her application by making entry thereon; and thereupon granted appellees the right to elect whether to relinquish the other homestead and to apply for that already allowed to appellant. (Record pp. 62-63.) We claim that in this action the officers of the land department transgressed judicial limitations and acted arbitrarily and contrary to justice, thereby depriving appellant of his homestead and the fruits of four years residence, improvements and labor.

Defenses.

Anticipating and meeting the defensive matter pleaded by appellees in their answer, appellant contends that he was not a trespasser on the land in question at any time. He camped on the county road until the land was opened to settlement on April 18, 1910, when he moved onto the land. (Record pp. 77-79.)

32 Cyc. p. 820. Note 74;

McAllister v. Ocanogan Co. (Wash.), 100 Pac. 146;

U. S. v. Bagnall T. Co., 178 Fed. 795;
Gourley v. Countryman (Okla.), 90 Pac. 427.

Appellees could not gain title by prescription where it appears that they and appellant were opposing claimants of title from the same government, until the requisite period of adverse user has elapsed after issuance of patent to one of them. The statute does not begin to run until the title passes from the government. (Patent herein was issued October 23, 1919, and this action was filed on February 13, 1920.)

Redfield v. Parks, 132 U. S. 239;
Gibson v. Choteau, 80 U. S. 92;
Godkin v. Cohn, 80 Fed. 458.

This is an action to recover title and possession of real property and the section of the California Statute of Limitations applicable to such action is section 318 of the Code of Civil Procedure, which reads as follows:

> "No action for the recovery of real property or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action."

Appellant's predecessor, the United States, was seized of this property up to October 23, 1919.

Curtner v. U. S. 149 U. S. 676;
Bradley Bros. v. Bradley, 20 Cal. App. 1;

Hillyer v. Hynes, 33 Cal. App. 506;
Truckee River G. E. Co. v. Anderson, 40 Cal. App. 526-33.

Prior to issuance of patent, plaintiff was under total disability to commence this action.

Frost v. Spitley, 121 U. S. 552;
Merriam v. Bocchioni, 112 Cal. 191;
Sproat v. Durland (Okla.), 35 Pac. 682-6;
Redpath v. Denee (Wash.), 148 Pac. 15;
Van Drachenfels v. Doolittle, 72 Cal. 295;
Sec. 312 Code of Civil Procedure of California.

It is respectfully submitted that the decree of dismissal should be reversed.

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